Where a claimant was given a performance improvement plan and was sent e-mails from the employer indicating that she had poor job performance, her job situation was tenuous, and the owner and the claimant did not understand each other well enough to get along, the claimant reasonably believed that she was soon going to be discharged for performance-based reasons. Therefore, she is not subject to disqualification under G.L. c. 151A, § 25(e)(1).

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Issue ID: 0021 8289 72

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from her position with the employer on June 8, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 11, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 21, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant quit her position after she was put on a performance improvement plan and was told by the owner that her situation as an employee was "very tenuous" due to her "poor job performance."

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked full time as a Farm Manager for the employer, a horse farm, from 02/01/10 until 06/08/17. The claimant's rate of pay was $365 weekly plus housing.

2. During the last two and one half years of her employment, the claimant felt as though she was required to do more "labor" than previously required of her due to the farm being understaffed.

3. The claimant complained to the owner who repeatedly told the claimant she was trying to hire help.

4. In November 2016, the employer hired a full time person to assist in the barn; the owner instructed the claimant and the new hire to "share barn chores."

5. In February 2017, the claimant underwent carpal tunnel surgery. The claimant asked the owner for temporary accommodations following the surgery which the owner did not allow.

6. Following her surgery, the employer placed the claimant on a one month leave of absence.

7. Upon her return to work, the claimant was physically able to perform her job duties.

8. Upon her return to work, the employer placed the claimant on a Performance Improvement Plan (PIP).

9. Upon her return to work, the claimant felt as if the employer "no longer wanted her there."

10. On 04/07/17, the employer owner emailed the claimant:

    "I'm really struggling with the difficulties I'm having getting you to do what I ask.

    When you started back to work on March 16th, you assured me you would try. If this is your best effort, then I have to conclude you aren't up to the job. If you're not trying your best, my conclusion is that you don't take your duties seriously enough, and have still not comprehended the situation you are in, which is very tenuous. Either way, we're at a crisis point.

    Please take the afternoon off after grain is set up. I'll feed and take care of anything else that needs doing in the afternoon. Please do night check tonight, and I'll do it tomorrow. Please stay away from the barn from 2:30 on.

Once again, due to your poor job performance, I'm doing your job. This is not a workable situation."

11. The claimant believed that the employer planned to discharge her and began searching for alternative housing.

12. In early May 2017, the claimant made an offer on a house that she ultimately purchased.

13. Because living at the farm was a term of her employment, the claimant planned to give a two week notice of resignation to the employer once the sale was final.

14. The claimant told the horse trainer at the farm that she had made an offer on a house.

15. The trainer informed the employer owner that the claimant had told her she was in the process of buying a house. The trainer told the owner, "If it was me, I would want to know."

16. On 05/07/17, the owner confronted the claimant and said "I heard you've been house hunting." The claimant told the owner: "Yes."

17. The owner was "unsettled" that she heard the news from someone other than the claimant.

18. The owner told the claimant: "If you're leaving, I want a 30 day notice."

19. The claimant told the owner she was submitting her 30 day notice that day.

20. The claimant worked through 06/08/17.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification.

It was undisputed that the claimant resigned her position as a farm manager. G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits. After only hearing testimony from the employer initially, the review examiner concluded that the claimant had not carried her burden. Following our review of the entire record, including the claimant's testimony and the review examiner's consolidated findings of fact, we conclude differently.

The consolidated findings of fact indicate that the claimant worked on the employer's farm and was compensated, in part, with housing. In February of 2017, the claimant had carpel tunnel surgery and did not work for approximately one month. After returning to work in mid-March of 2017, she was soon placed on a Performance Improvement Plan (PIP). *See* Remand Exhibit # 9, pp. 17–19. From what can be gleaned from the documents in the record, the claimant's performance does not appear to have improved significantly.

On April 7, 2017, the owner wrote the claimant an e-mail indicating that the owner was "struggling with the difficulties" of getting the claimant to do her work. The e-mail describes the situation as "very tenuous" and stated, "we're at a crisis point." Towards the end of the e-mail, the owner wrote, "[D]ue to your poor job performance, I'm doing your job. This is not a workable situation." Consolidated Finding of Fact # 10. Although not noted in the findings of fact, the claimant and owner then had subsequent communications. The claimant inquired as to what tasks were not getting done. The owner replied, "[T]here is an obvious disconnect . . . At this point, we don't need more detail or 'elaboration,' but rather need to acknowledge that we do not understand each other well enough to work well together." The claimant responded: "[s]o are you terminating me at this point?" The owner replied, "I won't terminate you this way." *See* Remand Exhibit # 4, pp. 8–10. Following her receipt of the PIP and the e-mail exchange, the claimant believed that the employer was going to discharge her. Consolidated Finding of Fact # 11. She eventually found a different place to live and confirmed to the owner that she was giving her notice and quitting.

Although the review examiner did not make an explicit finding as to why the claimant resigned in early May of 2017, we think that the consolidated findings of fact can reasonably be read to imply that the claimant quit due to her belief that she was going to soon be discharged. The claimant's housing was tied up with her employment. The fact that she started looking for a new home at the point she thought that she was going to be discharged suggests that the quitting is related to the belief of discharge. *See* Consolidated Finding of Fact # 11. In addition, the review examiner found that the claimant planned to give a two-week notice of resignation once the claimant had secured her new home. Consolidated Finding of Fact # 13. This too indicates that the search for the new home was related to the separation. Ultimately, the search for the home and the resignation which accompanied it related back to the claimant's belief that she was going to be discharged.

It is well-settled law that an employee who resigns under a reasonable belief that she is facing imminent discharge does not become disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. *See* Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the inquiry focuses on whether, if the claimant had been discharged, the separation would have been for a disqualifying reason under G. L. c. 151A, § 25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. *See* Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion); and White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–599 (1981).

Here, we think that the claimant had a reasonable belief that she was soon going to be discharged for performance-related issues.[1] The issues with the claimant's performance were documented clearly in the PIP. The April 7, 2017, e-mail clearly indicates the owner's displeasure with how the claimant was performing her job. The subsequent e-mails, in which the owner referred to "an obvious disconnect" and the feeling that "we do not understand each other well enough to work well together" confirmed the ongoing issues between the claimant and the owner. These e-mails also suggested that the claimant's job was in jeopardy. We realize that, in one of the final missives from the employer in the April 7, 2017, chain of e-mails, the owner wrote that she would not "terminate" the claimant "this way." However, the prior e-mails and the PIP reasonably made the claimant feel very uneasy.[2] Moreover, when the owner found out that the claimant had been searching for a different place to live, the owner did not indicate to the claimant that she wanted the claimant to stay, or that the employer still needed the claimant to work. Instead, the owner told the claimant that she would want a thirty-day notice if the claimant was quitting. While not determinative to us, the owner's response suggests an environment in which the owner was not looking to keep the claimant as an employee. We think that all of this combined to give the claimant a reasonable belief of an imminent discharge for performance reasons. The imminence of the discharge can reasonably be inferred from the owner's use of language such as, the claimant's situation was "very tenuous" and that the two women did not work well together.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits under G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence in the record or free from error of law, because the claimant has carried her burden to show that she reasonably believed that she could soon be discharged from her position for performance-based reasons.

[1] We note that this does not mean that there is actual evidence that the employer *was going to* discharge her. The standard is only whether the claimant could have reasonably believed that, based on the circumstances, her discharge would soon happen.

[2] It is also not clear what "this way" means. It could mean that the owner did not want to terminate the claimant over e-mail. In any event, we do not think that this one e-mail negates the effect that the rest of the conversation and circumstances had on the claimant's belief regarding a potential discharge.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 7, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 30, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh